STATE OF MICHIGAN
IN THE SUPREME COURT

THE ESTATE OF MARGARETTE F. EBY by its Personal Representative, DAYLE TRENTADUE,

Plaintiff/Appellee,

vs.

BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, SHIRLEY GORTON, LAURENCE W. GORTON, JEFFREY GORTON, VICTOR NYBERG, TODD MICHAEL BAKOS, and the ESTATE OF RUTH R. MOTT,

Defendants

And

MFO MANAGEMENT COMPANY,
Defendant-Appellant
_____/

SCT Nos 128623, 128624, 128625
COA Nos: 252155, 252207, 252209
C/A No: 03-252240
Case No: 2-74145-NZ
HON. ROBERT M. RANSOM

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BRIEF *AMICI CURIAE* ON BEHALF OF THE STATE BAR OF MICHIGAN NEGLIGENCE SECTION

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STATEMENT OF BASIS OF JURISDICTION

This motion and accompanying brief are being filed within the time limit under MCL 7.215(I) of the party whose position is being advocated, namely, in this case, Plaintiffs-Appellants.

STATEMENT OF QUESTIONS PRESENTED

I. MUST MCL 600.5827 NECESSARILY INCLUDE A COMMON-LAW DISCOVERY RULE, SO AS NOT TO RUN AFOUL OF MICHIGAN'S CONSTITUTIONAL GUARANTEE OF DUE PROCESS?

The Court of Appeals answered, "Yes"
Amicus Curiae urges this court to answer "Yes"

II. IF THIS COURT DECIDES TO OVERRULE THE LONGSTANDING COMMON-LAW DISCOVERY RULE IN NEGLIGENCE CASES, SHOULD THE NEW RULE BE APPLIED PROSPECTIVELY ONLY?

No Court has yet addressed this issue.
Amicus Curiae urges this court to answer "Yes".

STATEMENT OF FACTS

Amicus Curiae, State Bar of Michigan Negligence Law Section accepts the Statement of Facts asserted by Plaintiffs-Appellants.

DESCRIPTION OF THE *AMICI CURIAE*

The Negligence Section of the State Bar of Michigan is a section of the State Bar of Michigan. It is composed of Michigan lawyers interested in issues related to negligence litigation. Its composition includes members in roughly equal proportion who represent plaintiffs in negligence litigation, and those who represent defendants. The Section provides educational programs for its members, as well as for the public at large. Any member of the State Bar of Michigan is eligible for membership in the Negligence Section.

INTRODUCTION

This Court, in its order of July 19, 2006, granting leave in this matter, requested that all interested parties brief "whether the Court of Appeals application of a common law discovery rule to determine when plaintiff's claims accrued is inconsistent with or contravenes MCL 600.5827, and whether previous decisions of this Court, which have recognized and applied such a rule when MCL 600.5827 would otherwise control, should be overruled."

The question, as posed, at least admits of the possibility that this Court would consider placing a judicial gloss on MCL 600.5827 which would allow a cause of action to accrue, and then to be foreclosed by the running of a limitations period, prior to the injured party being aware that he or she had a potential claim - and, indeed, prior to any time when the injured party could possibly have known that he or she had a potential claim. Based upon bedrock principles of Michigan law, the position that MCL 600.5827 can be interpreted in such a way is constitutionally repugnant to the principle of due process of law.

Of course, the statutory wording, and the intent of the legislature in enacting such wording, taking the entire legislative scheme into account, will itself compel the conclusion that 600.5827 necessarily includes some sort of discovery rule within its terms. The briefing on that part of the question, however, will be left to others. The purpose of the instant brief, in accordance with the purpose of the Negligence Section of the Michigan State Bar, is to remind this court of the importance of not declaring, by judicial fiat, that actions can both accrue and be barred by a limitations statute, prior to a time when the injured party could possibly have known of the existence of such an action.

ARGUMENT

I. MCL 600.5827 MUST NECESSARILY INCLUDE A COMMON-LAW DISCOVERY RULE, SO AS NOT TO RUN AFOUL OF MICHIGAN'S CONSTITUTIONAL GUARANTEE OF DUE PROCESS.

A claim for personal injury must allege that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, (3) the defendant's breach was the proximate cause of the plaintiff's injuries, and (4) damage. *Chase v Sabin*, 445 Mich 190; 516 NW2d 60 (1994).

Before the Court of Appeals, Defendant MFO argued that the wrong occurred in 1986 and the statute ran three years later. This overly simplistic analysis was properly rejected by the Court of Appeals. It analyzed the history of Michigan's jurisprudence adoption and application of the discovery rule in negligence cases. Here, the Court of Appeals explicitly found that the relationship of defendants to the killer could not have been discovered by plaintiff, under the circumstances of the case, until the killer's identity became known, and the means of access of the killer into the residence became established. Plaintiff could not have known of the existence of a cause of action against the defendants until the facts of the murder became known. Therefore, the statute of limitations did not start running until the Plaintiff, exercising reasonable diligence, was able to identify the elements for the cause of action to exist. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 303; 701 NW2d 756 (2005). It is undisputed that the rule in Michigan has always provided that the limitations period begins to run after the plaintiff obtains the objective facts upon which to bring his claim. Indeed, to change this bedrock rule would be "to extinguish a cause of action before the plaintiff is aware of the possible cause of action . . . 'to declare the bread stale before it is baked.'" *Stephens v Dixon*, 449 Mich 531, 536; 536 NW2d 755 (1995) (citing *Chase*, 445 Mich at 196-97).

The discovery rule, based on principles of fundamental fairness, "was formulated to avoid the harsh results produced by commencing the running of the statute of limitations before a claimant was aware of any basis for an action." *Stephens, supra*. Under the discovery rule, a claim accrues when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. *Solowy v Oakwood Hospital Corporation*, 454 Mich 214; 561 NW2d 843 (1997).

The discovery rule has been applied in a myriad of circumstances. For example, the discovery rule controls the date a pharmaceutical product liability action accrues. *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1995). In *Moll*, the Court reiterated the general rule that a claim accrues when all of the elements of a cause of action can be alleged. The *Moll* Plaintiffs complained that the ingestion of DES, manufactured by Abbott Laboratories, had caused infertility problems. The plaintiffs argued that the discovery rule should begin to run once they were subjectively certain that the drug had caused the injury. The Court rejected the argument, instead adopting an objective standard for the discovery of the cause of action. In *Moll* the issue turned on knowledge of objective facts giving rise to a cause of action:

> [W]e find that a Plaintiff's cause of action accrues when, on the basis of objective facts, the Plaintiff should have known of an injury, even if a subjective belief regarding the injury occurs at a later date.

Moll, supra,at 28.

In *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974), this Court applied the discovery rule to allow a claim against an abstractor of real property for negligent misrepresentation. The Court found that the discovery rule extends the limitation period where the plaintiff discovers a breach of duty beyond three (3) years from the time the representation is made:

> General tort law principles in Michigan as discussed supra, support our determination that the statute of limitations does not begin running until the point where Plaintiff knows or should have known of this negligent misrepresentation. At that point, the four elements in *Connelly* [*v Paul Ruddy's Co*, 388 Mich 146; 200 NW2d 70 (1972)] are satisfied: a legal duty exists, such duty is breached, a proximate causal relation is established (if Plaintiff can show reliance on the abstract), and the Plaintiff then is, or should be, aware of any resultant damages.

If §600.5827 were to be interpreted so as to abrogate the common law discovery rule, such would deprive persons in the shoes of the instant plaintiffs due process of law under Michigan's Constitutional guarantee of Due Process, Mich Const 1963, Art. I, §17. This has always been so, even prior to the adoption of the Constitution of 1963, and has remained so since that enactment:

> "The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power has been unwisely exercised. But the legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away···· It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law." *Price v. Hopkins,* 13 Mich. 318, 324-325 (1865).

A statute that expressly extinguishes a common law right may be regarded as a proper exercise of legislative authority. For example, 1935 P.A. 127; M.C.L.A. s 551.301; M.S.A. s 25.191, which abolished the common law cause of action for alienation of affections, criminal conversation, seduction and breach of contract to marry was held to be constitutional in *Bean v*

McFarland, 280 Mich 19; 273 NW 332 (1937). But where the statute under consideration is solely intended to be a statute of limitations, the legislature is making clear its intentions not to abrogate entirely a class of actions, but instead to place limitations on the person who would assert a claim. Such legislative action requires the would-be claimant to assert his or her claim within a legislatively specified time, or to forego it altogether.

This Court also examined this bedrock principle in *Dyke v Richard*, 390 Mich. 739, 213 N.W.2d 185 (1973) at 746-747. At issue in that case was whether the medical malpractice statute of limitations then existing could be read as allowing a cause of action to accrue, and then be barred, by the running of the limitations period prior to the injured party possibly being aware of the existence of such a claim. The *Dyke* court answered this question in the negative:

> Since '(I)t is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought . . .', *Price, supra*, a statute which extinguishes the right to bring suit cannot be enforced as a law of limitation. As to a person who does not know, or in the exercise of reasonable diligence could not ascertain within the two-year period that he has a cause of action, this statute has the effect of abolishing his right to bring suit. Such a statute, if sustainable at all could be enforced only as one intended to abolish a common law cause of action. But this statute does not purport to do this, is not asserted to do so, and we cannot ascribe any legislative intention to accomplish that end. We read it as a statute of limitation which applies in every case except where the plaintiff does not know of his cause of action.

This constitutional interpretation is not limited to Michigan. For example, Louisiana, in considering the constitutionality, in general, of the application of a medical malpractice statute of repose to an action based on allegedly negligent conduct, which occurred prior to the enactment of the statute, has held that the statute may be applied to such an action only if a reasonable amount of time remains, after the patient discovered his or her injury, to commence the action.

in *Lott v Haley*, 370 So 2d 521 (1979). To apply the three-year repose provision of the state medical malpractice statute of limitations, La. Rev. Stat. Ann. § 9:5628, to causes of action arising from negligence committed before the statute's September 12, 1975, effective date would deprive a patient of a vested right in violation of the due process guarantees under the state and federal constitutions if the patient is not provided a reasonable time, following the enactment of the statute, in which to file his or her action. It is well established, the court said, that statutes of limitation are remedial in nature and as such are generally accorded retroactive application. However, the court emphasized, statutes of limitation, like any other procedural or remedial law, cannot, consistent with the state and federal constitutions, apply retroactively to disturb a person of a pre-existing right. Where an injury has occurred for which the injured party has a cause of action, the court declared, such cause of action is a vested property right that is protected by the guarantee of due process.

Similarly, the Vermont court, when faced with the validity of applying an amendment to the repose provision of the state medical malpractice statute of limitations, in *Lillicrap v Martin,* 156 Vt 165; 591 A2d 41 (1989) held that, under a newly enacted or amended statute of repose, a person must be permitted a reasonable time in which to file an action that arose and remained viable under a prior statute of limitations, where the reasonable amount of time apparently was measured from the patient's discovery of the injury, rather than from the effective date of the statute or amendment. While the legislature may impose reasonable limitations on rights of action, the court said, due process does not permit the legislature to annul vested rights. A vested cause of action, the court stated, is property and is protected from arbitrary interference. Stressing that accrual and vesting are not identical concepts, the court said that a cause of action arises, or vests, at the time of the defendant's claimed negligence, at which moment the cause

acquires the status of a property right in the form of a "substantial right to redress by some effective procedure," while accrual is measured from the date of discovery of the injury so that a limitations period will not unfairly bar relief.

II. ANY OVERRULING OF THE COMMON LAW DISCOVERY RULE MUST BE ON A PROSPECTIVE-ONLY BASIS.

The long, unwavering history of the common law discovery rule has been documented in Section I, *supra*. When this court is considering overruling more than a century of unbroken precedent, the test set out in *Pohutski v Allen Park*, 465 Mich 675, 695-699; 641 NW2d 219 (2002) must be applied.

In *Pohutski*, the longstanding doctrine in question was the "trespass nuisance" doctrine, as previously set out in *Hadfield v Oakland County Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988). The three factors in determining whether a major shift in the controlling caselaw should operate prospectively only are: "(1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; and (3) the effect of retroactivity on the administration of justice." *Pohutski, supra.*, at 676.

The *Pohutski* court, in applying these rules to the overruling of the trespass-nuisance doctrine, noted that the purpose of the new rule was to "correct an error" in the interpretation of a statute. It then noted that there had been "extensive reliance" on the old rule by both courts and practitioners, as well as by insurance companies. Finally, prospective application "minimizes the effect of this decision on the administration of justice." *Id.*, at 677.

Applying the same test to the instant matter, the same conclusions must be drawn. The only purpose in reinterpreting 600.5827 would be to "correct an error" by countless courts, practitioners, and insurance companies, who have routinely read into the act a "discovery rule" for the purpose of ensuring that valid causes of action would not be barred prior to the time when the injured party could possibly have known of their existence. Therefore, should this court take it upon itself to overrule the longstanding line of cases applying a discovery rule to common law negligence actions, in order to minimize the effect of this decision on the administration of justice, it should be given purely prospective application.

CONCLUSION:

For all the above reasons, the Court of Appeals analysis is correct, and must be upheld. It would be a violation of Constitutional principles to allow a statute to impliedly allow the barring of actions, before the person suffering the wrong could possibly have any idea that such an action might exist.

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